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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92066968
Party	Defendant Software Freedom Conservancy
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Attachments	Motion for Reconsideration final.pdf(370279 bytes )

	)	
Software Freedom Law Center,	)	
	)	
Petitioner,	)	
	)	Cancellation No.
v.	)	92066968
	)	
Software Freedom Conservancy,	)	
	)	
Respondent.	)	
	)	

Pursuant to Rule 2.127(b), Respondent requests reconsideration of the Board's denial of Respondent's Motion for Summary Judgment. 28 TTABVue. The Board took the unusual step of denying summary judgment after having received only the opening brief; the Petitioner did not file an opposition brief and the Respondent had no opportunity for a reply brief.

In its denial the Board stated that “Respondent has failed to carry its burden of establishing a lack of a genuine dispute of material fact regarding whether confusion is inevitable.” 28 TTABVue 3. However, the Respondent does not have the burden of showing that there is an absence of inevitable confusion. Instead, the Petitioner has the burden of showing that there *is* inevitable confusion. Here, the Petitioner never even filed a brief, so there was no evidence on inevitable confusion at all, much less enough for the Board to conclude that there is a question of fact in dispute on inevitable confusion.

Therefore, Respondent requests that the Board withdraw its denial of Respondent's Motion for Summary Judgment and defer its decision on the motion until after it has been fully briefed.

### **ARGUMENT**

The question of inevitable confusion is reached only after the court or Board has decided that the equitable defense applies. *TPI Holdings, Inc. v. Trailertrader.com, LLC*, 126 U.S.P.Q.2d 1409 (T.T.A.B. 2018); *Teledyne Techs., Inc. v. W. Skyways, Inc.*, 78 U.S.P.Q.2d 1203 (T.T.A.B. 2006) (“Accordingly, respondent has established a laches defense against petitioner's likelihood of confusion claim. ¶ The final point to consider is whether the confusion between the parties' marks is inevitable because, if it is, then the defense of laches is not applicable.”); *The Christian Broad. Network, Inc. v. ABS-CBN Int'l*, 84 U.S.P.Q.2d 1560 (T.T.A.B. 2007) (“In cases such as this, where equitable defenses have been pleaded and proved, it is necessary to decide whether the question of likelihood of confusion is inevitable”).

It then becomes the petitioner's burden to show that there is inevitable confusion. *Ava Ruha Corp. v. Mother's Nutritional Ctr., Inc.*, 113 U.S.P.Q.2d 1575 (T.T.A.B. 2015) (“we reiterate the burden is now for Petitioner to show that confusion is inevitable, absent which the claim is barred by Respondent's affirmative defense of laches”); *TPI Holdings, Inc. v. Trailertrader.com, LLC*, 126 U.S.P.Q.2d 1409 (T.T.A.B. 2018) (stating that, for its inevitable confusion argument, Petitioner had the burden of proving priority and family of marks). Therefore, the Board flatly erred by stating that the Respondent had the burden to establish the absence of inevitable confusion. 28 TTABVUE 3.

That error made all the difference. It is not for the Board to reach a conclusion based only on the hypothetical possibility there will be some evidence submitted by the non-moving party; rather, the Petitioner must come forward with evidence that there is at least a question of fact in dispute on inevitable confusion. Petitioner has not done so for the simple reason that it never filed an opposition to the motion for summary judgment.

Even if, contrary to *Ava Ruha Corp.*, the Board were to find that the Respondent has the initial burden of showing the absence of inevitable confusion, the Respondent has done so. Respondent, with a registered trademark, enjoys a presumption that there is an absence of likelihood of confusion. *Tony Lama Co., Inc. v. Anthony Di Stefano*, 206 U.S.P.Q. 176 (T.T.A.B. 1980). Further, the Respondent pointed out that the marks are not identical, that the goods and services are not identical or even in the same International Class, and that there has been 10+ years of coexistence without any confusion of which Respondent was aware. 20 TTABVue 13. Respondent therefore made a prima facie case that was sufficient for a fact finder to find there is an absence of inevitable confusion. *See, e.g., The Christian Broad. Network, Inc. v. ABS-CBN Int'l*, 84 U.S.P.Q.2d 1560 (T.T.A.B. 2007) (prefixing ABS before CBN and 13 years of concurrent use of the marks without any actual confusion was sufficient to show there would not be inevitable confusion); *Teledyne Techs., Inc. v. W. Skyways, Inc.*, 78 U.S.P.Q.2d 1203 (T.T.A.B. 2006) (no inevitable confusion where the identical marks were used for ignition harnesses for aircraft engines and aircraft engines, which the Board characterized as goods that were not the same or substantially the same).

The moving party having made its prima facie case, the responding party must then come forward with evidence rebutting the moving party's prima facie case.

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Petitioner has not done so because it has not filed an opposition to the motion. It was therefore improper for the Board to deny summary judgment without putting Petitioner to its proof.

### **CONCLUSION**

The Board made a critical error when it failed to appreciate that the Petitioner, not the Respondent, has the burden of proof on inevitable confusion. There has been no evidence whatsoever of any inevitable confusion and therefore a denial of the Respondent's motion was premature and improper. The Registrant therefore asks that the Board withdraw the denial of the Respondent's Motion for Summary Judgment and allow the motion to be fully briefed by both parties.

SOFTWARE FREEDOM  
CONSERVANCY



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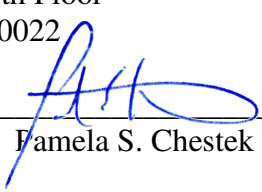
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served upon Petitioner this 21st day of January 2019, by emailing a copy thereof to Petitioner's counsel at [mishi@softwarefreedom.org](mailto:mishi@softwarefreedom.org) and [smcmahon@ostrolenk.com](mailto:smcmahon@ostrolenk.com).

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